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No. 86-1587

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JOSEPH TOUSSAINT, et al.,
Petitioners,

VS.

DANIEL J. MCCARTHY, et al.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Defendants-Respondents have opposed Plaintiffs-Petitioners' Petition for Writ of Certiorari. In doing so, they ask this Court to ignore the history and context of this nearly fourteen year old prison conditions lawsuit, that are so essential to framing the questions of law.

1. The context of this case includes this Court's summary affirmance of a three judge district court's entry of partial summary judgment in this very case, Wright v. Enomoto, 462 F.Supp. 397 (N.D.Ca. 1976 Three Judge) (App. 549), summarily aff'd, 434 U.S. 1052 (1978) (App. 540). That decision has now been vacated by the Ninth Circuit, Toussaint v. McCarthy, 801 F.2d 1080, 1091-93, 1114 (App. 34-40, 144-45) (9th Cir. 1986). Yet Wright has never been overruled by this Court and was recently cited by the Court in Hewitt v. Helms, 459 U.S. 460, 469 (1983)), the case upon which the Ninth Circuit most relied to vacate Wright.

Thus, the first question before this Court is the authority of a lower federal court to vacate a partial summary judgment that this Court has summarily

affirmed. It is not, as defendants argue, simply whether the Ninth Circuit was permitted within the "law of the case" and the "charged circumstances" doctrines to alter the permanent injunction to conform to current legal standards. Defendants-Respondents Brief in Opposition at 8-13 (hereinafter "Respondents' Opposition").

In other cases involving the interpretation by lower courts of summary affirmances by the Court, the summary affirmances were of judgments in cases other than the ones being decided. By contrast, plaintiffs' Petition for Writ of Certiorari raises the issue of the authority of a Court of Appeals to second guess and vacate a summary affirmance in the very case in which it was entered by this Court. Thus none of the cases cited by the defendants involved similar facts

or the same context as presented here. See Defendants' Opposition at 11, citing Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982); Mandel v. Bradley, 432 U.S. 173, 176 (1977)); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979).

This Court did, however, provide clear guidance on the question presented here in Mandel, holding that:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.
>
> 432 U.S. at 176.

This Court should grant the Petition for Writ of Certiorari to give further guidance to the lower federal courts as to their obligations in dealing with summary affirmances by this Court.

2. The context and history of this case also include the significant facts that:

(1) the conditions in which inmates have been confined in the San Quentin and Folsom lock-up units have violated constitutional minima for more than fourteen years;

(2) on appeal the defendants did not contest the district court's findings of fact as to the long standing unconstitutionality of those conditions;

(3) despite ample opportunities to do so, the defendants systematically failed and refused to cure these unconstitutional lock-up conditions;

(4) the district court correctly found that the defendants frequently place and retain inmates in their unconstitutional lock-up units indeterminately (often for

years) as well as unjustifiably and arbitrarily;

(5) the defendants have persistently violated injunctions, the first of which was entered in 1976 and which were designed to control unjustified, arbitrary and capricious placement and retention in cruel and unusual lock-up conditions.

Nowhere in their Opposition do the defendants address this context and history, except to say that the plaintiffs seek "to inflate these perceived factual differences [from those in Hewitt v. Helms, 459 U.S. 460 (1983)] into important, unresolved issues of law...." Respondents' Opposition, at 16. However, it is plain that the uncontested record in this case places before this Court very important issues of a district court's authority to fashion a meaningful

remedy in a civil rights prison conditions action brought under 42 U.S.C. § 1983. Those issues are not answered, as Respondents argue (Opposition at 14-18), by reference to two decisions of this Court, Hewitt and Superintendent Mass. Correctional Institution v. Hill, 472 U.S. _____, 86 L.Ed.2d 356 (1985).

Hewitt and Hill decided only issues of procedural due process. See Petition at 29-40. The issues here, by contrast, involve important unresolved questions of a district court's authority in a case where uncontested violations of the Eighth Amendment exist, and where prior court orders have been ignored.

This Court has often held that the district courts have full authority to impose comprehensive remedies to assure elimination of unconstitutional acts and effective enforcement of their orders.

Hutto v. Finney, 437 U.S. 678 (1978); United States v. Paradise, 480 U.S. _____, 94 L.Ed.2d 203 (1987). See also Hewitt, supra, 459 U.S. 460, 468; id. at 481 n.4 (Stevens, J., dissenting). For good reason, defendants ignored these principles and cases in their Opposition.

Simply put, the question to be considered in the context of this case is the scope of the district court's remedial powers when prison authorities have long operated admittedly unconstitutional lock-up units and persistently violated the trial court's corrective orders. This Court should grant Plaintiffs' Petition for Writ of Certiorari to clarify whether and to what extent the Court's decisions in Hewitt and Hill qualify the district court's remedial powers in such circumstances.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: May 8, 1987